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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 346

HICKMAN GARMENT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Hickman Garment Company, petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 17, 1969, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. A1-A2) is reported at 408 F.2d 684. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 172 NLRB No. 118 (App., infra, pp. A2-A47).

JURISDICTION

The decision of the Court of Appeals was rendered on April 17, 1969 (App., infra, pp. A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTION PRESENTED

(1) Whether employees who violate a lawful plant rule and appropriate an area of the plant barred to them and refuse to return to work after being instructed to do so even after their grievance has been rejected are engaged in protected concerted activities?

STATUTES INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 et seq.), insofar as is here pertinent, provides:

Section 7.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choos-

ing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT OF THE CASE

I.

The Facts

A. The elimination of the afternoon break and the resulting aftermath.

Petitioner, Hickman Garment Corporation, is engaged in the production of raincoats for the United States Department of Defense (App., infra, p. A9). Effective February 1, 1967, the Petitioner eliminated an afternoon break period for its employees as a result of an increase in the Federal statutory minimum wage law. This action was necessitated because the Petitioner was faced with a financial crisis. A notice to all employees was posted announcing the elimi-

nation of the break effective February 1, 1967 (App., infra, pp. A6-A7). The Respondent found that the decision to eliminate the afternoon break was not violative of any provision of the National Labor Relations Act (App., infra, p. A24).

The afternoon break previous to February 1, 1967, was taken in four sections. Apparently the first section did not take an afternoon break on February 1.

Some of the employees who had previously been assigned to the second break section took a break in the lunchroom. Philip Roseman, Petitioner's President, upon hearing of this went to the lunchroom and found the employees drinking cokes and smoking. Roseman informed the employees that their actions constituted a wildcat strike and mutiny, and that he was going to discharge the participants, but right at that moment, to return to their machines. The employees left the lunchroom and returned to their machines. After the employees returned to their work stations Roseman barricaded the lunchroom by placing benches across the lunchroom door to prevent any further work stoppage (App., infra, pp. A9-A10).

Later that afternoon a number of the employees who had previously taken their break on the fourth break period tore away the barricade erected in front of the lunchroom and entered the lunchroom and proceeded to take their break which had been eliminated. Roseman upon hearing of the employees' actions returned to the lunchroom. A heated discussion ensued, several employees expressing dissatisfaction that their break had been eliminated, Roseman rejected the grievance and ordered the employees back to work—they refused—Roseman then terminated the employees (App., infra, pp. A10-A12, A30).

II.

The Board's Decision and Order

The Board adopted the findings, conclusions and recommendations of the Trial Examiner (App., infra, pp. A46-A47). The Trial Examiner found that the employees' actions heretofore set forth constituted protected concerted activities thereby immunizing them from discipline. The Trial Examiner relied exclusively upon this Court's decision in *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962), where this court held that employees who ceased all work and left the plant due to its intolerably cold condition were engaged in protected concerted activity (App., infra, p. A17). In *Washington Aluminum*, supra, the employees, who did not have a bargaining agent, struck. The protected activities of the employees in *Washington Aluminum*, supra, differ from those in our case materially. Here the employees neither worked nor struck, they created a situation which we submit was neither work nor strike. They simply appropriated an area of the plant barred to them for their own purposes refusing to return to work upon request after their grievance was denied (App., infra, pp. A30-A31).

The Board also found that the Petitioner committed other violations of Section 8 (a) (1) of the Act. These findings are not in issue here. The Board further found that the Petitioner violated Section 8 (a) (3) and (1) of the Act by terminating two employees. All of these violations occurred after the critical date in issue.

III.

The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order per curiam. It stated that the Board's decision was supported

by substantial evidence on the record considered as a whole (App., infra, pp. A1-A2).

REASONS FOR GRANTING THE WRIT

Recurring litigation at an increasing tempo has arisen under the National Labor Relations Act with respect to whether unorganized employees who engage in various forms of work stoppages are engaged in concerted protective activities within the protective umbrella of the National Labor Relations Act. The decisions of the Court of Appeals are in conflict, and a decision by this Court on such an important question is critical to the administration of the National Labor Relations Act.

I. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Fifth Circuit

In *Dobbs Houses, Inc.* v. *N.L.R.B.*, 325 F.2d 531 (CA 5, 1963) the Court of Appeals for the Fifth Circuit had occasion to consider whether the discharge of waitresses who struck because of a discharge of a supervisor was protected concerted activity, the Court answered in the negative. The Board there, as it did here, relied almost exclusively on this Court's decision in *N.L.R.B.* v. *Washington Aluminum*, supra. The Court held:

> "The Board urges that a strike is not rendered unprotected because of the availability to the employees or other concerted activities short of striking . . . (or) the reasonableness or wisdom of their selection of a particular course of action." In support of this position the Board cites N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 and N.L.R.B. v. Mackay Radio & Telegraph Co, 304 U.S. 333. The reasonableness of a course of action must be determined initially to ascertain whether in fact it is protected. (Citations omitted).

"The course of the employees grievance must be considered in determining the reasonableness of their course of conduct undertaken in protest. We have not here reached the state of Washington Aluminum. There the men were working under intolerably cold conditions. Without a union or grievance procedure, concerted activity to protect took the form of a walkout. The conditions there were within the proper realm of employee entered, and the walkout while extreme under the circumstances was reasonably related to the complaint."

II. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Eighth Circuit

In *N.L.R.B.* v. *Montgomery Ward & Co.*, 157 F.2d 486 (CA 8, 1946) the Court of Appeals for the Eighth Circuit reversed a Board decision where the Board had found a violation of the Act where the Employer discharged several employees who refused to perform certain assigned duties. The Court held:

"Moreover while Slanko, Gaylord and Sullivan had the right to go on strike, 'they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse, openly or secretly, to the employer's damage to do their work.'"

In our cause the employees decided "when" they were going to perform their assigned tasks, ignored a directive to return to work after their grievance was denied, remained assembled in a part of the plant barred to them, violated a lawful plant rule and all the while accepting the wages paid to them. What choice does an employer have when faced with such a situation if the Board's view be accepted? We submit only one, accept the demands he is faced with.

III. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Seventh Circuit

In *C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 F.2d 390 (CA 7, 1939), the Court of Appeals found that employees who refused to work overtime and walked out of the plant and then wanted to return to work the next morning did not engage in protected concerted activities. The Court stated:

> "We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance."

Further:

> "We are aware of no law of logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in their instance. It is not a situation in which employees work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."

The Board in the instant cause invoked the protective umbrella of *Washington Aluminum,* supra, to immunize the employees from discipline. But we submit the Board's position is untenable; *Washington Aluminum,* supra, protects employees who strike. Here the employees did not

strike. As the Seventh Circuit said an employee cannot "be on a strike and at work simultaneously." Either the employee remains on the job subject to the authority of the employer or off the job as a striker. Here, in our cause, the employees remained on the "job" after being directed to return to work after their grievance was denied. By no logic can they be said to be on strike within the framework of *Washington Aluminum*, supra.

IV. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Fourth Circuit

In *Home Beneficial Life Ins. Co.* v. *N.L.R.B.*, 159 F.2d 280 (CA 4, 1947), cert. den. 332 U.S. 758, the Company had a rule which required insurance agents to report to their district office each morning before beginning their outside work. A number of employees through concerted activity refused to obey the reporting rule and were discharged. The Court held:

> "The Statute (S 7), expressly recognizes the right of employees 'to engage in concerted activities' but does not and could not confer upon them the right to engage in masse in unlawful activities, or to defy the authority of the employer to manage his business while remaining in his service."

The Court also cited and relied heavily on the Seventh Circuit's decision in *C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 F.2d 390.

V. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Third Circuit

In *McNeely & Price Company* v. *N.L.R.B.*, 106 F.2d 878 (CA 3, 1939), the Court of Appeals for the Third Circuit

held that employees who participated in a sitdown were not engaged in protected concerted activities. Two elements present in *Fansteel* were absent in this case (1) the employer did not discharge the employees during the sitdown, and (2) the strike was not marked by violence. The Court expressly found the case governed by this Court's decision in *Fansteel.*

Long ago this Court held in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), that employees who engaged in a sitdown strike were not engaged in protected concerted activities. This Court stated:

> "Here the strike was illegal in its inception and prosecution."

But the Board relies on this Court's decision *Washington Aluminum,* supra, *Fansteel,* supra, is inoperative, *Washington Aluminum,* supra, cannot be applied we respectfully submit because the catalyst for its application is missing—namely a strike. In *American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965), this Court held:

> "The right to strike as commonly understood is the right to cease work—nothing more;" and ". . . a strike . . . which is 'partial' is . . . unprotected."

The Decision of the Board sustained per curiam by the Sixth Circuit must mean that employees who are dissatisfied with a plant rule may (1) appropriate an area for their own use which has been barred to them (2) refuse to return to work upon request and continue to be paid (3) work upon conditions prescribed unilaterally by them, and (4) violate a lawful plant rule. Here the grievance was denied and the employees still refused to return to work after being requested to do so. The employer under the rule promulgated in this case cannot we submit continue to operate his business unless he acquiesces to the em-

ployees' demands for he cannot, the Board says, resort to discharge in order to replace them with employees who will work.

VI. The Position Taken by the National Labor Relations Board in Its Brief to the Eighth Circuit Cannot Be Reconciled with the Board's Position in the Instant Cause.

Presently pending before the United States Court of Appeals for the Eighth Circuit is a case styled *First National Bank of Omaha* v. *National Labor Relations Board* (No. 19,356), wherein the Board in its brief to the Court stated:

> "Work stoppages which are 'partial,' 'intermittent,' or 'recurrent' have been held unprotected because they produce 'a condition that (is) neither strike nor work.' Thus, the Board and the courts have deemed it an 'indefensible tactic for employees to refuse to work on the terms prescribed by their employer, and yet to remain on their jobs and thus deny their employer the opportunity to replace them with workers who will accept these terms." (App., infra, p. A50).

The Board stated further:

> "Here, however, the employees walked out instead of remaining on their jobs and engaging in a partial strike. It was therefore unnecessary to discharge them in order to clear the way for replacements." (App., infra, p. A51).

The Board, we respectfully submit, has taken a position in its brief to the Eighth Circuit which cannot be reconciled with the Board's position in our cause. We earnestly and respectfully submit that the Board's brief heretofore discussed supports our position.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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